# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>February 22, 2005 |
| V | No. 251974<br>Kent Circuit Court |
| CLAUDE CHALMERS,<br><br>Defendant-Appellant. | LC No. 03-001857-FH<br>03-002667-FH |

Before: Schuette, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), in case number 03-002667-FH, and possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), in case number 03-001857-FH. Defendant was sentenced to 1½ to 20 years in prison for the possession with intent to deliver less than 50 grams of heroin conviction, to be served consecutive to 90 days in jail for the possession of less than 25 grams of cocaine conviction. We affirm defendant's convictions and sentences, but remand for correction of clerical errors contained in the judgments of sentence.

On January 31, 2003, Detective Robert Stanton radioed Officer Thomas Gootjes with a description of defendant's car, and asked Gootjes to stop defendant. Shortly thereafter, Gootjes initiated a traffic stop of defendant for a speeding violation, asked defendant to step out of his car, and received consent to search defendant's person and the car. Officer Adam Baylis arrived as backup, and conducted the search of defendant's person, which did not yield any contraband. During his search of the car, Gootjes observed an envelope on the front passenger seat that contained seven packets of heroin. Gootjes arrested defendant and called Stanton to inform him that defendant was in custody.

Defendant testified to a completely different account of his arrest: according to defendant, four police officers ran up to his car, opened all four doors, and one of the officers pulled him out and handcuffed him before saying anything. Defendant first testified that the police planted the seven packets of heroin in his car, but later testified that it belonged to a prostitute to whom he had given a ride earlier in the day.

Stanton arrived on the scene and asked defendant if he "wanted to help himself out with the case that he had just gotten himself into." According to Stanton, defendant "said something to the effect of, 'I'll do anything, I don't want to go to jail,'" and also referred to "a guy he

named Art." Stanton and defendant agreed to meet a few blocks away to discuss the possibility of defendant becoming an informant. Defendant was released from custody, and he and Stanton drove separately to an abandoned parking lot, where they pulled up side-by-side in their cars to talk. Defendant, however, maintains that as soon as Stanton arrived at the scene, he was released from custody and told to follow Stanton. According to defendant, once they arrived at the abandoned parking lot, Stanton informed defendant that "you're now going to work for me."

Stanton testified that he asked defendant who Art was, and that defendant replied that Art was from Detroit, and "was the guy he worked for, made deliveries for." Defendant told Stanton that he drove Art to and from Detroit several times a week to pick up heroin to bring back to Grand Rapids. Defendant had attempted to deliver ten packets of heroin for Art earlier in the day, but the buyer only wanted three, leaving him with seven packets when he was arrested by Gootjes. Defendant indicated that he would have to "come up with" $140 to give Art to cover the seven packets that he had been unable to sell, so that it would look like he had actually sold all of the heroin. Stanton affirmed that defendant was "definitely intent on selling" the heroin, and that it was only a matter of "when." Stanton suggested that he give defendant $140 to give to Art, so that it would look like defendant had sold all ten packets as originally planned, to prevent Art from becoming suspicious.

Stanton then advised defendant about the process of becoming a reliable informant. Stanton interviewed defendant concerning his knowledge of the drug trade, and explained that defendant would have to complete a minimum of three supervised "reliability buys" before being considered a reliable informant and being used to apprehend other drug offenders. Stanton made it a point to emphasize that defendant should not go out and purchase drugs on his own, and defendant indicated that he understood. Stanton and defendant then exchanged cell phone numbers, and Stanton instructed defendant to call him at least once a day. At the conclusion of their ten minute conversation, Stanton provided defendant with $140 to give to Art, and followed defendant to Art's house. Art was not there, so defendant proceeded to another possible location. Stanton was well-known in the area where defendant was headed, so he instructed defendant to go pay off Art on his own, and to call Stanton afterward, so that they could start on the reliability buys.

Approximately two hours later, Officer Philip Braate was conducting surveillance, and saw defendant pick up a young male who had been standing on a corner, drive thirty yards, and then drop off the male. Braate suspected that a drug sale had just occurred, and initiated a traffic stop of defendant for failing to wear his seatbelt and for a defective driver's side mirror. Defendant immediately stated that he was "working for Bosco," i.e., Detective Stanton. Braate asked defendant for his driver's license, noticed that defendant's fist was clenched, and asked defendant what was in his hand. Defendant held out a rock of crack cocaine and gave it to Braate. Braate arrested defendant and called Stanton, who stated that defendant had not been making a controlled buy for him at that time. Stanton nevertheless requested Braate to release defendant and instruct defendant to call Stanton as soon as he was released.

Stanton testified that defendant did not call him immediately after he was released by Braate as he had been instructed, but instead called him a day or two later. Stanton attempted to contact defendant several times thereafter: a few times defendant answered and said nothing was going on; two weeks later, another person answered the phone and said that it no longer

belonged to defendant. Stanton then obtained two arrest warrants for defendant, who was arrested in Detroit and charged with the crimes in the instant case.

Defendant first argues that his statements to Stanton[1] were inadmissible because they were made during a custodial interrogation and he had not waived his Fifth Amendment right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17; *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Because defendant failed to object below, we review this unpreserved constitutional issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 762-764; 597 NW2d 130 (1999).

It is well settled that *Miranda* warnings are not required unless the accused is subject to a custodial interrogation. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). A custodial interrogation is "questioning initiated by [a] law enforcement officer[] after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *People v Hill*, 429 Mich 382, 387; 415 NW2d 193 (1987), quoting *Miranda*, *supra* at 444. Whether an accused was in custody depends on the totality of the circumstances, and the key inquiry is whether the person reasonably believed that he was not free to leave. *People v Marsack*, 231 Mich App 364, 374; 586 NW2d 234 (1998). "The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned." *Zahn*, *supra* at 449.

Here, the record does not support a conclusion that defendant was in custody when he revealed information about making deliveries for his supplier: he had been released from custody and was in his own car, voluntarily discussing the possibility of becoming an informant with Stanton. Faced with the option of going to jail and being charged with a drug crime versus the prospect of "help[ing] himself out with the case that he had just gotten himself into" by becoming an informant and possibly avoiding a criminal charge, defendant chose the latter option. In other words, defendant made his incriminating statements while out of custody, to avoid being placed in custody. Defendant cannot now claim a constitutional violation where he took advantage of a situation which did not ultimately inure to his benefit. Defendant has not demonstrated that admission of his incriminating statements amounted to plain, i.e., clear or obvious, error. *Carines*, *supra* at 763.

Further, even if we were to conclude that defendant's incriminating statements were made while he was in custody without having been advised of his *Miranda* rights, defendant has not met his burden of persuasion regarding prejudice. *Carines*, *supra* at 763. That is, defendant has not demonstrated that the error affected the outcome of the lower court proceedings. *Id.* There was sufficient evidence, most notably the seven delivery-ready packets of heroin, to convict defendant of possession with intent to distribute heroin aside from his statements to

[1] Our analysis applies only to the statements defendant made to Stanton in the parking lot where they met after defendant was released from the Gootjes arrest. His earlier statements—"I'll do anything, I don't want to go to jail," and the reference, without any context given, to "a guy . . . named Art"—were not inculpatory.

Stanton. Therefore, any error in the admission of those statements did not affect defendant's substantial rights, and he is unable to avoid forfeiture of this unpreserved issue. *Id*.

Defendant also argues that defense counsel was ineffective for failing to object to the admission of the statements he made to Stanton. We disagree. Because defendant failed to move for a new trial or for a *Ginther*[2] hearing, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

To establish a claim of ineffective assistance of counsel, defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). However, it is well settled that defense counsel is not ineffective for failing to make a futile motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). In light of our determination that defendant's statements to Stanton were properly admissible, we find that defense counsel was not ineffective for failing to object to the admission of such evidence. Defense counsel's performance was not deficient. Further, defendant has not demonstrated that his counsel's allegedly deficient performance prejudiced his defense. As noted above, introduction of the contested statements did not affect the outcome of the proceedings, because there was sufficient evidence aside from them upon which to base the convictions. *Pickens, supra* at 303. Defendant is not entitled to relief on this issue.

Defendant next argues that there was insufficient evidence to support his conviction for possession with intent to deliver less than 50 grams of heroin. We disagree. When determining whether sufficient evidence has been presented to sustain a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to establish the elements of a crime. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004). Additionally, minimal circumstantial evidence is sufficient to prove an actor's state of mind. *Id*. at 270-271.

To support a conviction for possession with intent to deliver less than fifty grams of heroin, it is necessary for the prosecutor to prove four elements: (1) that the recovered substance is heroin; (2) that the heroin is in a mixture weighing less than 50 grams; (3) that defendant was not authorized to possess the substance; and (4) that defendant knowingly possessed the heroin with the intent to deliver. *Id*. at 516-517. On appeal, defendant only challenges the sufficiency of the evidence regarding the fourth element—that he knowingly possessed heroin with the intent to deliver. See CJI2d 12.3.

Defendant argues that there was insufficient evidence of the corpus delicti of the crime to allow his statements to Stanton to be admitted at trial. We disagree. The corpus delicti rule

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

provides that "a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury . . . and (2) some criminal agency as the source of the injury." *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995). Sufficient circumstantial evidence of defendant's intent to deliver heroin existed independent of the statements.

Our Supreme Court has held that "actual delivery of narcotics is not required to prove intent to deliver," and that "[i]ntent to deliver [may be] inferred from the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest." *Wolfe, supra* at 524. Here, the evidence presented at trial demonstrated that defendant possessed heroin that was packaged for sale in individual packets. There was no evidence to suggest that the heroin was possessed simply for personal use—no paraphernalia typically used to ingest heroin was discovered in defendant's car or on defendant's person. These facts provided sufficient circumstantial evidence, independent of defendant's statements, to prove that the crime of possession with intent to deliver less than 50 grams of heroin occurred, thereby satisfying the corpus delicti rule. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence from which a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt; therefore, defendant is not entitled to relief on this issue.

Defendant next argues that the trial court erred in sentencing him as both a second controlled substances offender, MCL 333.7413(2), and as a fourth-offense habitual offender, MCL 769.12. Because defendant failed to object to the sentence imposed by the trial court, we review his unpreserved claim of sentencing error for plain error affecting substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

This Court has held that "[a]s a specific and comprehensive measure the [controlled substances] act's sentence-augmentation provision controls over the general habitual offender statute." *People v Edmonds*, 93 Mich App 129, 135; 285 NW2d 802 (1979). Further, the fourth-offense habitual offender statute provides that "[i]f the subsequent felony is a major controlled substance offense, the person shall be punished as provided by part 74 of the public health code." MCL 769.12(1)(c). The subsequent offender provision of the controlled substances act allows sentencing to "a term not more than twice the term otherwise authorized." MCL 333.7413(2). Thus, the habitual offender statute does not allow for an increase in the authorized maximum sentence in cases subject to sentence enhancement as a second or subsequent controlled substances offense. Rather, the maximum sentence may be increased by up to twice the maximum provided for the particular controlled substance offense. MCL 333.7413(2).

The authorized punishment for possession with intent to deliver less than 50 grams of heroin is imprisonment for not more than 20 years. MCL 333.7401(2)(a)(iv). The authorized punishment for possession of less than 25 grams of cocaine is imprisonment for not more than 4 years. MCL 333.7403(2)(a)(v). Because defendant was a second controlled substances offender, the trial court had the discretion to sentence defendant to a maximum term of 40 years for the possession with intent to deliver less than 50 grams of heroin conviction, and to a maximum term of 8 years for the possession of less than 25 grams of cocaine conviction. However, the trial court sentenced defendant to 1½ to 20 years in prison for the possession with intent to deliver less than 50 grams of heroin conviction, MCL 333.7401(2)(a)(iv), to run consecutive to his sentence to 90 days in jail for the possession of less than 25 grams of cocaine conviction, MCL

333.7403(2)(a)(v). Although the judgments of sentence indicate that defendant was sentenced as both a second controlled substances offender and as a fourth-offense habitual offender, a review of the sentence actually imposed reveals that the trial court did not exercise its discretion to enhance defendant's maximum sentence.

Defendant has failed to demonstrate plain error affecting his substantial rights; therefore, he is not entitled to relief on this unpreserved issue. However, although we affirm defendant's convictions and sentences, we remand for correction of the judgments of sentence and direct that the references to enhancement under the fourth-offense habitual offender statute, MCL 769.12, and the second controlled substances offender statute, MCL 333.7413(2), be deleted.

Finally, defendant argues that remand is appropriate to correct a clerical error in the judgment of sentence. Defendant was convicted of possession with intent to deliver less than 50 grams of heroin, a controlled substance classified in schedule 1, MCL 333.7212. However, the judgment of sentence indicates that defendant was convicted of possession with intent to deliver less than 50 grams of cocaine, a drug described in MCL 333.7214(a)(iv). In any event, both offenses fall under MCL 333.7401(2)(a)(iv), and on remand, the trial court must correct the judgment of sentence to reflect the crime of which defendant was actually convicted, i.e., possession with intent to deliver less than 50 grams of heroin.

We affirm defendant's convictions and sentences, but remand for deletion of all references to enhancement under the fourth-offense habitual offender statute, MCL 769.12, and second controlled substances offender statute, MCL 333.7413(2), as well as for correction of the controlled substance regarding which defendant was actually convicted under MCL 333.7401(2)(a)(iv), i.e., heroin. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra